

MORRISON | FOERSTER

2000 PENNSYLVANIA AVE., NW
WASHINGTON, D.C.
20006-1888

TELEPHONE: 202.887.1500
FACSIMILE: 202.887.0763
WWW.MOFO.COM

226669
MORRISON & FOERSTER LLP
NEW YORK, SAN FRANCISCO,
LOS ANGELES, PALO ALTO,
SAN DIEGO, WASHINGTON, D.C.
NORTHERN VIRGINIA, DENVER,
SACRAMENTO, WALNUT CREEK
TOKYO, LONDON, BRUSSELS,
BEIJING, SHANGHAI, HONG KONG

March 19, 2010

BY HAND DELIVERY

Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20024

ENTERED
Office of Proceedings

MAR 19 2010

Part of
Public Record



Re: Finance Docket No. 35304: *San Francisco Bay Railroad-Mare Island* – Notice of
Exemption – *California Northern Railroad*

Dear Acting Secretary Quinlan:

Enclosed for filing in the above-referenced docket are an original and ten copies of the
Petition to Revoke Exemption on behalf of Lennar Mare Island LLC, along with a check
payable to the Surface Transportation Board for the filing fee of \$250, in accordance with 49
C.F.R. § 1002.2(f)(61).

Please date stamp the extra copy of this filing and return it with our waiting messenger.

Respectfully,

Karen E. Escalante

Enclosures

cc (with enclosures): John F. McHugh, Esq.
Thomas Sheaff, Esq.

FILED

MAR 19 2010

**SURFACE
TRANSPORTATION BOARD**

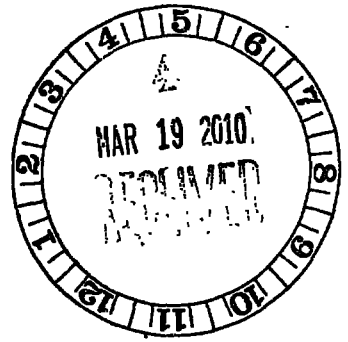
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MAR 19 2010

**SURFACE
TRANSPORTATION BOARD**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35304



**SAN FRANCISCO BAY RAILROAD-MARE ISLAND –
OPERATION EXEMPTION – CALIFORNIA NORTHERN RAILROAD**

PETITION TO REVOKE EXEMPTION

David L. Meyer
Karen E. Escalante
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
202.887.1519
dmeyer@mof.com

Attorneys for Lennar Mare Island, LLC

March 19, 2010

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35304

**SAN FRANCISCO BAY RAILROAD-MARE ISLAND –
OPERATION EXEMPTION – CALIFORNIA NORTHERN RAILROAD**

PETITION TO REVOKE EXEMPTION

Pursuant to 49 U.S.C. § 10502(d), Lennar Mare Island, LLC ("LMI") petitions to revoke the exemption issued to San Francisco Bay Railroad-Mare Island ("SFBRR") in Finance Docket No. 35304 to the extent that exemption applies to trackage located on Mare Island and owned by LMI. SFBRR's Verified Notice of Exemption ("Notice") contained false and misleading information relating to the ownership of that trackage and SFBRR's rights thereto, and the exemption accordingly should be revoked as void *ab initio*.¹

SFBRR's Notice purported to seek operating authority over eight miles of railroad trackage in and near Vallejo, California, running from a connection with the California

¹ LMI is seeking revocation at this time because, as discussed below (p. 10); for some time it was engaged in discussions with SFBRR regarding its intentions with respect to the proposed operation of LMI-owned trackage, with the aim of determining whether a mutually-acceptable arrangement could be worked out to allow SFBRR access to LMI's property. LMI subsequently refrained from filing to allow an informal Board-sponsored dispute resolution process to proceed. That process ended on March 15, when SFBRR filed its Petition in Finance Docket No. 35360.

Northern Railroad at Flosden Acres, across the Mare Island Strait via the Mare Island Causeway, and terminating on "branches on Mare Island." A map depicting this line, based on that provided with SFBRR's Notice, is Exhibit A hereto.² Contrary to the representations contained in SFBRR's Notice, the portion of this trackage located on Mare Island is owned by LMI, not by the City of Vallejo. With the sole exception of a short spur adjacent to the Causeway serving a single customer,³ SFBRR has no contractual or other rights to operate over that trackage, and there is no prospect of SFBRR obtaining any such rights.⁴ Accordingly, the Surface Transportation Board should revoke the exemption with respect to that trackage. LMI does not seek any action -- and takes no position at this time -- with respect to the exemption as it relates to trackage between Flosden Acres and the Mare Island Causeway, which is owned by the City of Vallejo. See Exh. A.

BACKGROUND

Redevelopment of Mare Island Navy Shipyard

LMI is a real estate development company that owns and is in the process of redeveloping a significant portion of the property formerly occupied by the U.S. Navy's Mare Island Shipyard, including the rail trackage on Mare Island purportedly covered by

² SFBRR's map did not identify LMI as the owner of the trackage on Mare Island.

³ Alstom, one of LMI's tenants, has a non-exclusive leasehold interest in the 300-yard spur that connects its plant with the Mare Island Causeway (as shown on Exhibit A). Those rights allow Alstom to arrange private switching service using the spur with SFBRR or any other contract provider of its choosing, so long as Alstom complies with the terms of its lease from LMI. LMI understands that SFBRR has recently switched some railcars on this spur.

⁴ The factual assertions contained herein are verified by Thomas Sheaff of LMI. Mr. Sheaff's Verified Statement is Exhibit B hereto.

SFBRR Notice. For more than 150 years, the Mare Island Naval Shipyard, a major U.S. Navy installation, occupied all of Mare Island. The Shipyard was placed on the official base closure list in 1993 and was officially closed in 1996. The U.S. Government entered agreements providing for the conveyance of portions of the real property underlying the former Shipyard to the City of Vallejo for conversion to civilian use. The City contemplated that the former base would be comprehensively redeveloped into an extensive and vibrant mixed-use civilian community. To carry out this vision, the City conducted an extensive public selection process and appointed LMI as the master developer in 1997. In this role, LMI commenced a multi-year process that is still underway and has included the settlement of numerous jurisdictional issues, coordination of entitlements between many public and private agencies, development in conjunction with the City of a comprehensive plan for redevelopment (primarily referred to as the "Specific Plan"), preparation of a full Environmental Impact Report, oversight of one of the most complex environmental clean up projects in California, and coordination of all types of land uses where no such planning and coordination had previously existed.

The first 653 acres of the Mare Island site were conveyed to LMI in 2002. As part of carrying out LMI's redevelopment of this property, LMI entered into an innovative "early transfer agreement" with the U.S. Navy that transfers certain environmental responsibility to LMI and thereby allows development to be accelerated. Certain environmental cleanup responsibilities, both within and outside LMI's 653 acres, were retained by the U.S. Navy, and the Navy's remediation efforts are ongoing, including work that has necessitated the removal of certain rail trackage by the Navy's contractor to allow it to address contamination of underlying soil.

The redevelopment plan contemplates that the former-Shipyard will have 1,400 private residences and over seven million square feet of space devoted to industrial, manufacturing, office, civic, retail, restaurant, and entertainment uses. Redevelopment will also include creation of an extensive park, pedestrian and bicycle system throughout the Island that links all land uses. A majority of the 403 historic structures and other resources at the former-Shipyard will be retained and reused.

Substantial redevelopment work has already been carried out. LMI has already invested over \$140 million in the redevelopment of Mare Island, mostly on infrastructure to serve both LMI and adjacent property. There are approximately 90 businesses, and in excess of three million square feet occupied, all resulting in more than 1,865 new permanent jobs. Residential land sales to third parties have led to 272 residential units. Several commercial properties have been sold. Mare Island has a public elementary school, a private university, and a museum. Approximately 50 percent of LMI's property has been certified as clean by the environmental regulators, and over 45 historic former U.S. Navy buildings have been put back into use.

However, the development project is very much a work in progress. Extensive work remains, including a significant amount of work to address additional environmental remediation and infrastructure improvements to deal with conditions inherited from the years when this property was a working Navy installation. LMI continues to design infrastructure and continues to meet its obligations to rehabilitate streets, wet and dry utilities, railroad trackage and other infrastructure to make them safe and compatible with the radically-transformed public land use needs of Mare Island. As a military facility, of course, Mare Island was not accessible to the public, was not built

in conformance with any minimum standards or specifications that would normally be applied by public agencies, and, as a result its infrastructure was not designed with public use and civilian safety as a principal consideration. Allowing public access to new local parks, the new waterfront promenade, new regional parks and wetlands on the Island, the new pedestrian and bike paths, and the new public ferry terminal, all in the context of a site that in large part was previously devoted to heavy military industrial use, are just a few of the many complex issues that LMI and the City of Vallejo are working to address. LMI is working closely with the City to identify safe and cost-effective solutions.

Railroad Trackage at Mare Island

When Mare Island was a military installation, the U.S. Navy installed and operated several miles of railroad trackage that it used to carry out its own military functions. For example, trackage connected ammunition storage facilities on the Island with docks used to load munitions on warships, and equipment was delivered by rail from the mainland to the warehouse, manufacturing and drydock facilities used by the Navy to build and maintain warships. Befitting the Shipyard's status as a major industrial site, and because public access and safety were not paramount issues at the time, much of the trackage, particularly in the eastern portion of the Island, was laid directly in the Shipyard's streets, roadways and parking lots, rather than occupying its own right of way.

When the Navy closed the Mare Island Shipyard in the mid-1990s, it also shut down its own rail operations. Much of the former Navy trackage remained in place, however. LMI and the City of Vallejo believe that some portions of that trackage could play a productive role in the redevelopment of Mare Island, so long as any use of that

trackage could be carried out in a manner compatible with the ongoing mixed-use redevelopment of Mare Island as a whole.

After the Navy's own rail operations ceased, the first rail operations on the line that were conducted by an entity other than the Navy were those of California Northern Railroad, pursuant to a short-term license granted by the U.S. Navy to California Northern, and for which no Board authority was sought. In 1993, California Northern had leased Southern Pacific's Vallejo Branch (now owned by Union Pacific), which runs from Napa Junction to the City of Vallejo and connected with the Navy railroad at Flosden Acres. The Navy license allowed California Northern to provide switching services at certain Shipyard facilities and to operate on Navy trackage to a connection with California Northern's own leased trackage at Flosden Acres, where the Navy previously had exchanged cars with that carrier.

California Northern's operations on Mare Island ceased in early 2008, after the volume of cars switched declined precipitously – as a result, *inter alia*, of a devastating fire at one business on Mare Island and the relocation of another to a location off of the Island where it could obtain longer-term access to facilities – leading LMI and California Northern to conclude that rail service would no longer support the infrastructure work needed to make rail service compatible with the Island's redevelopment.

California Northern did not seek Board authority when it ceased operating on Mare Island. At no time did California Northern hold itself out as a common carrier, or obtain any Board authority to operate on Mare Island.

The City and LMI have recently had discussions to address the future of the rail service on Mare Island. LMI has taken steps to allow limited rail service to its tenants

and other businesses reached via LMI property, subject to the overriding need for any use of the rail trackage that LMI now owns be carried out solely in furtherance of LMI's interest as the owner and developer of Mare Island in accordance with the City approved Specific Plan. As discussed below, after discussions with SFBRR aimed at determining whether an acceptable arrangement could be worked out to provide SFBRR with access to LMI-owned trackage on Mare Island, LMI concluded that no such agreement was possible.

After unsuccessful attempts to reach agreement with SFBRR, LMI decided to carry out its aim of making rail service an option for LMI's tenants and other businesses on Mare Island, by arranging for a private rail operator – T&O Railroad Company, Inc. ("T&O"), doing business as Mare Island Rail Service ("MIRS") – to perform switching services on Mare Island. T&O is an affiliate of Tri-City Railroad Company, LLC, an experienced rail carrier licensed by the Board with operations in the State of Washington. Pursuant to the agreement between LMI and T&O, MIRS will provide private switching services throughout Mare Island. MIRS will move railcars to and from former-U.S. Navy sidings and spurs on Mare Island as appropriate to allow for loading and unloading of railcars at locations where LMI has leased or conveyed facilities to businesses that LMI concludes would benefit from rail service, and where such service would not impinge on the broader redevelopment interests shared by LMI and the City.

SFBRR's Notice of Exemption

SFBRR is a stranger to Mare Island, having no connection to the Island and no interest (contractual or otherwise) in the railroad trackage on Mare Island. SFBRR's Notice of Exemption – which appeared to ignore LMI's ownership interest in the

trackage on Mare Island and assert a right to operate as a common carrier serving that trackage – came as a surprise to LMI. Despite contact with LMI before SFBRR filed its Notice, SFBRR did not inform LMI that it intended to seek Board authority to operate over LMI property on Mare Island prior to filing that Notice.

Despite SFBRR's unilateral action, LMI opened a dialog with SFBRR about SFBRR's intentions with respect to the Mare Island trackage, and the terms on which LMI might be prepared to allow it to use LMI-owned trackage to provide private rail service on the Island. Although SFBRR initially claimed that it did not need LMI's permission to operate over the track on Mare Island, SFBRR later acknowledged that it did not have any contractual right to use LMI's trackage. In November 2009, LMI informed SFBRR that, without regard to the outcome of ongoing discussions between LMI and SFBRR about broader rights to operate on Mare Island, SFBRR could operate on the Alstom spur (the first 300 yards on the Mare Island side of the Causeway) to serve Alstom, per the terms of Alstom's lease. The only operations SFBRR has conducted on Mare Island have involved the delivery of cars to Alstom.

Based on LMI's discussions with SFBRR about a potential arrangement for SFBRR to operate on Mare Island, LMI reached the conclusion that SFBRR's objectives are incompatible with LMI's property interests and redevelopment obligations, and that no agreement with SFBRR is possible. Although SFBRR has absolutely no contractual or other rights to use LMI's property, it nevertheless asserts that LMI is obligated to grant it virtually unrestricted access to LMI's trackage – including the right to operate anywhere at any time hauling any commodity it wishes – based solely on SFBRR's claim

that its Notice of Exemption purports to appoint it the “common carrier” operator of trackage on Mare Island.

Nevertheless, LMI was willing to forebear from filing its Petition to revoke so as to permit the Board’s Rail Customer & Public Assistance Program to undertake an informal dispute resolution process aimed at determining whether the differences between LMI and SFBRR could be bridged. That process ended when SFBRR decided to file its Petition for Declaratory Order and for an Emergency Service Order in Finance Docket No. 35360.

ARGUMENT

As stated in the Board’s Notice in this matter, exemptions under 49 U.S.C. § 10502 are void *ab initio* when the verified notice contains false and misleading information. Here, SFBRR’s verified notice was false and misleading in at least two interrelated respects.

First, SFBRR misrepresented that it did not need to obtain from LMI any contractual rights to operate over trackage located on Mare Island. SFBRR instead falsely represented (at 2, § “c”) that the City of Vallejo “owns the real estate occupied by the line of railroad,” and that SFBRR was “currently negotiating an operating agreement with the City.” *San Francisco Bay Railroad – Mare Island – Operation Exemption – California Northern Railroad*, STB Finance Docket No. 35304 (served Sept. 28, 2009). This statement falsely implied that all of the trackage subject to SFBRR’s notice was owned by the City of Vallejo and that SFBRR therefore *did not need* to reach agreement with LMI.

Second, SFBRR's verified notice also stated (at 2, § "d") that SFBRR proposed to operate over "lines owned by the City of Vallejo, California *and/or Lennar Mare Island, LLC.*" *Id.* (emphasis added). Read in conjunction with SFBRR's representations about its negotiation of an operating agreement with the City of Vallejo, this statement plainly (and falsely) suggested that, to the extent LMI did own any of the trackage, SFBRR already had whatever contractual rights it needed to conduct operations on LMI's property.

Whether interpreted as representing that the Mare Island trackage was owned by the City instead of by LMI, or as representing that SFBRR already had rights to operate over trackage owned by LMI, SFBRR's verified notice was false and misleading. In fact, there can be no dispute that LMI owns all of the trackage on Mare Island, and that (other than the Alstom spur, as to which Alstom could arrange its own private rail service) SFBRR has no right whatsoever to use that trackage without LMI's agreement.⁵ Despite being aware of these facts, as of September 28, 2009 – the date of SFBRR's verified notice – SFBRR had made no effort whatsoever to obtain any such rights from LMI.

The Board has held that false and misleading statements about the ownership status of a rail line warrant revocation of an exemption as void *ab initio*. For example, in *US Rail Corp. – Lease & Operation Exemption – Shannon G., a New Jersey Limited Liability Company*, STB Finance Docket No. 35042 (served Oct. 8, 2008), the Board revoked the exemption where the verified notice failed to mention a pending condemnation action that was aimed at ending Shannon G.'s ownership of the very parcel

⁵ SFBRR's recent Petition in Finance Docket No. 35360 seeking an emergency service order from the Board granting access to LMI's property at terms fixed by the Board, confirms that SFBRR understands that it has no rights to use LMI's trackage.

on which it proposed to conduct rail operations. *See also, e.g., Black Hills Transportation, Inc., d/b/a Deadwood, Black Hills & Western R.R. – Modified Rail Certificate*, STB Finance Docket No. 34924 (served Jan. 27, 2010), p. 4 (“Failure to disclose potential issues regarding ownership of the issue line in a notice could be found to be materially misleading by omission.”). SFBRR’s misrepresentations are no less fundamental, as they assert rights to conduct operations on LMI’s property that simply do not exist.⁶

In this case, there are particularly compelling policy reasons for revoking SFBRR’s exemption with respect to the LMI-owned trackage on Mare Island. In discussions with LMI and others SFBRR has claimed that its exemption provides it with the “obligation” to serve potential rail customers on Mare Island as a railroad that has been granted common carrier regulatory authority. Such statements, of course, ignore that whatever authority might be granted by a Board exemption (even if not void *ab initio*) would be at most “permissive,” and would not provide any contractual rights to carry out the exempted operations. *See, e.g., Lackawanna County Railroad Authority – Acquisition Exemption – F&L Realty, Inc.*, STB Finance Docket No. 33905 (served Oct. 22, 2001) (“The question of whether a party (or parties) have regulatory authority to operate over a particular segment of track is different from the question of whether that

⁶ This case is unlike those where the Board has found that an entity’s lack of contractual rights to operate a line it was seeking authority to operate did not warrant revocation of the exemption. *See, e.g., The Chicago, Lake Shore & South Bend Ry. – Acquisition & Operation Exemption – Norfolk Southern Ry.*, STB Finance Docket No. 34960 (served Feb. 14, 2008), p. 3. In such cases, the noncarriers were merely “overly optimistic” about the prospects for an agreement, but did not affirmatively misrepresent the identity of the line’s owner or the noncarrier’s lack of any need for them to obtain contractual rights.

party (or parties) have the necessary property interest or contractual right under applicable agreements to exercise that authority.”); *James Riffin – Petition For Declaratory Order*, STB Finance Docket No. 35245 (served Sept. 15, 2009) (“Riffin claims that whether legal title has passed is irrelevant because he has Board authority to operate the line. But that authorization is permissive, not mandatory, and did not give him a legal property interest in the line. Riffin would have to acquire some suitable legal interest that would give him the ability to exercise his authority and hold himself out as a common carrier before he could qualify as a rail carrier.”).

Here, there is no dispute that SFBRR lacks any such “property interest or contractual right,” and LMI as the owner of the trackage has determined that SFBRR will not be permitted to conduct any such operations. As noted above, LMI has instead contracted with Mare Island Rail Service to perform private switching operations on Mare Island. Against this backdrop, the exemption should be revoked so that SFBRR may no longer point to its falsely-obtained exemption as providing it with a mantle of “regulatory authority” to operate on Mare Island.⁷

⁷ Revocation would also be warranted under the standards of 49 U.S.C. § 10502(d), on the ground that SFBRR’s proposed common carrier operations – if they could be successfully implemented – “would convert private carrier operations into for-hire common carrier service. Such a conversion triggers this agency’s primary jurisdiction, thus withdrawing the service and the property over which it operates from many aspects of local control.” *Riverview Trenton R.R. – Acquisition & Operation Exemption – Crown Enterprises, Inc.*, STB Finance Docket No. 33980 (served Feb. 15, 2002). As in *Riverview Trenton*, SFBRR’s proposed operations would usurp “local control over the property involved,” and thereby interfere with LMI’s ongoing redevelopment of Mare Island. LMI submits that SFBRR is misusing Board processes in order to try to impose itself into the middle of a locally controlled redevelopment and transformation of Mare Island from a military base into a vibrant mixed-use community. Interposing common carrier obligations and the sweeping preemption that accompanies Board jurisdiction would improperly interfere with that transformation in fundamental ways. These issues

(footnote continued on next page ...)

CONCLUSION

For the foregoing reasons, the Board should revoke SFBRR's exemption.

Respectfully submitted,



David L. Meyer
Karen E. Escalante
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Suite 6000
Washington, D.C. 20006
202.887.1519
dmeyer@mofo.com

Attorneys for Lennar Mare Island, LLC

March 19, 2010

(... footnote continued from previous page)

will be litigated more fully in the related declaratory order proceeding commenced by SFBRR in Finance Docket No. 35360. If the Board is disinclined to revoke SFBRR's exemption as void *ab initio*, LMI requests that it consolidate this Petition with that proceeding so that the question of SFBRR's regulatory authority can be considered in conjunction with the question of its common carrier obligations with respect to Mare Island trackage.

Finance Docket No. 35304

**Annotated Version of Map Accompanying
SFBRR Notice of Exemption**

Exhibit A

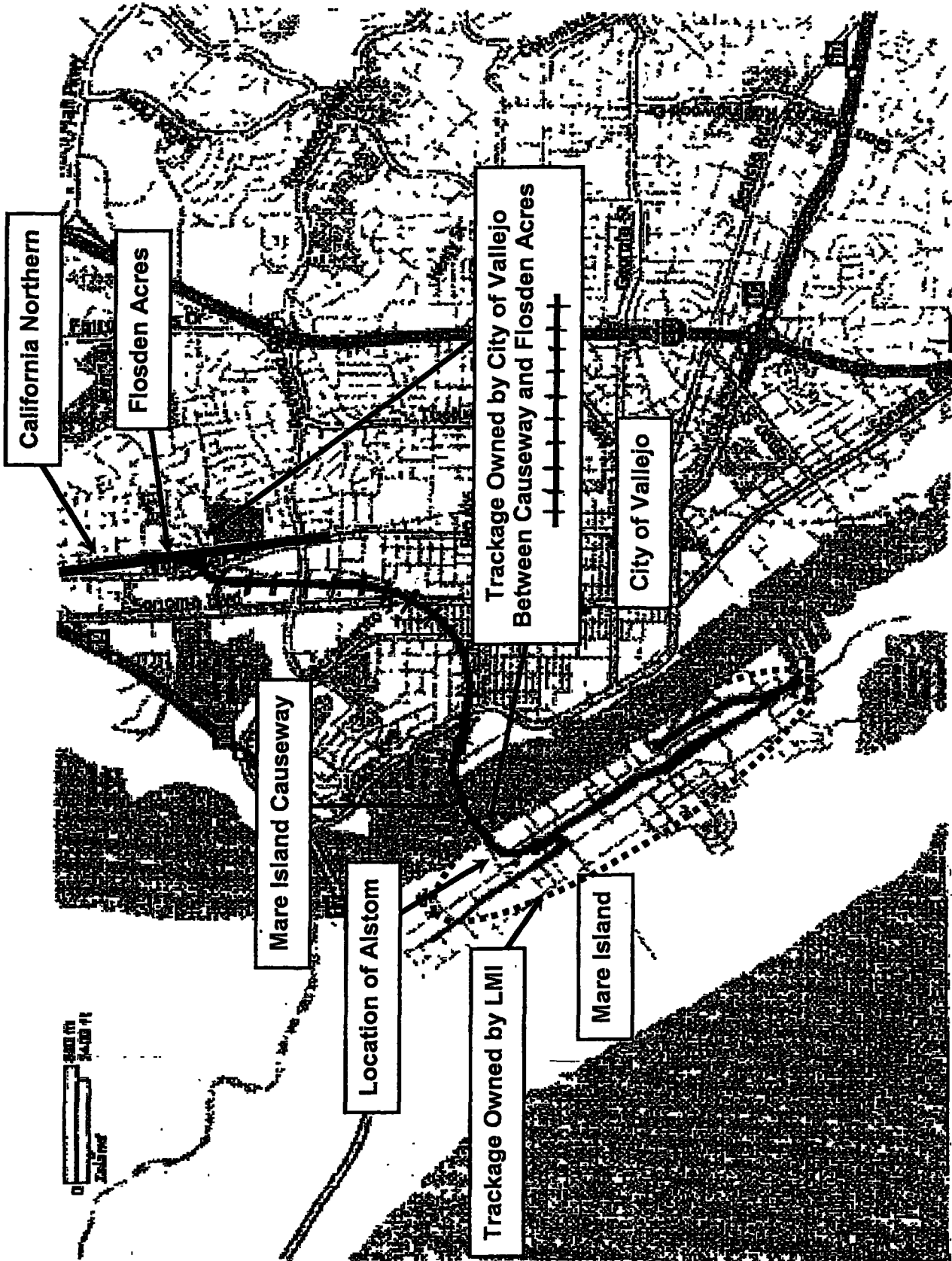


EXHIBIT A

ANNOTATED VERSION OF MAP ACCOMPANYING SFBRR NOTICE OF EXEMPTION

Finance Docket No. 35304

Verified Statement of Thomas Sheaff

Exhibit B

EXHIBIT B
VERIFIED STATEMENT
OF
THOMAS SHEAFF

1. My name is Thomas Sheaff. Since 1998, I have served in various capacities for Lennar Mare Island, LLC ("LMI"). Currently, I am a Vice President, and an officer of, Lennar Homes of California, the sole member of LMI.

2. I have been responsible for LMI's implementation of its Mare Island redevelopment project. I am familiar with LMI's acquisition of Mare Island from the City of Vallejo, the redevelopment objectives of the City and LMI, LMI's plans for carrying out those objectives, and all of the issues associated with the former U.S. Navy rail trackage located on Mare Island and owned by LMI.

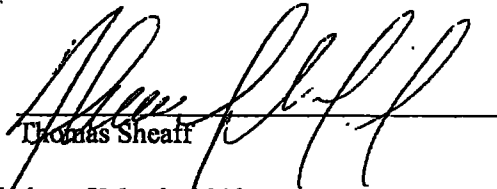
3. I have also been personally involved in discussions with San Francisco Bay Railroad-Mare Island regarding its proposed operations on LMI-owned trackage and LMI's arrangements on Mare Island rail service.

4. I am submitting this statement in connection with LMI's Petition to Revoke Exemption and have reviewed the accompanying Petition. All of the factual statements therein are within my personal knowledge and are true and correct as stated.


VERIFICATION

State of California)
)
) SS
)
County of Solano)

Thomas Sheaff, being duly sworn, deposes and says that he has read the foregoing statement and Petition to Revoke Exemption, knows the facts asserted therein are true and that the same are true as stated.


Thomas Sheaff

Subscribed and sworn to before me this 19 th day of March, 2010.


Notary Public

Notary Public of California.

My Commission expires: July 19 2010



CERTIFICATE OF SERVICE

I, Karen E. Escalante, certify that on this date a copy of Lennar Mare Island LLC's Petition to Revoke Exemption, filed on March 19, 2010, was served by email and by first-class U.S. mail, postage prepaid, on all parties of record, specifically:

John F. McHugh
6 Water Street
Suite 401
New York, NY 10004
Email: JFMcHughPC@AOL.com



Karen E. Escalante

Dated: March 19, 2010